

---

**SC 94256**

---

**In the Missouri Supreme Court**

**Ray Charles Bate and Deborah Sue Bate, Appellants**

**v.**

**Greenwich Insurance Company, Respondent**

---

**Appeal from the Circuit Court of Boone County, Missouri  
13<sup>th</sup> Judicial Circuit  
The Honorable Christine Carpenter**

---

**Appellants' Substitute Reply Brief**

---

**Christian L. Faiella #45684  
Rex V. Gump #25634  
Tatlow, Gump, Faiella & Wheelan  
110 North Fifth Street  
Moberly, MO 65270  
660-263-3100 (phone)  
660-263-0660 (fax)  
[cfaiella@tgflaw.com](mailto:cfaiella@tgflaw.com)**

**Susan Ford Robertson #35932  
J. Zachary Bickel #58731  
The Robertson Law Group, LLC  
1903 Wyandotte, Suite 200  
Kansas City, MO 65108  
816-221-7010 (phone)  
816-221-7015 (fax)  
[susanr@therobertsonlawgroup.com](mailto:susanr@therobertsonlawgroup.com)**

**Attorneys for Appellants Ray Charles Bate and Deborah Sue Bate**

## Table of Contents

Table of Cases and Authorities.....	3
Argument .....	5
Conclusion .....	9
Appendix (electronically filed separately).....	10
Certificate of Service and Compliance .....	11

## Table of Cases and Authorities

### Cases

<u>Forsyth Financial Group, LLC v. Hayes,</u>	
351 S.W.3d 738 (Mo.App. 2011) .....	8
<u>J.C.W. ex rel. Webb v. Wyciskalla,</u>	
275 S.W.3d 249 (Mo. banc 2009) .....	8
<u>Maddox v. State Auto. Mut. Ins. Co.,</u>	
356 S.W.3d 231 (Mo.App. 2011) .....	6
<u>Sieg v. International Environmental Management, Inc.,</u>	
375 S.W.3d 145 (Mo.App. 2012) .....	8
<u>Strong v. American States Preferred Ins. Co.,</u>	
66 S.W.3d 104 (Mo.App. 2001) .....	6

### Missouri Statutes and Rules and Regulations

§374.045 R.S.Mo.....	7
§375.906 R.S.Mo.....	5, 6, 7
Mo.R.Civ.Proc. 54.15 .....	6
Mo.R.Civ.Proc. 54.18 .....	6
Mo.R.Civ.Proc. 54.20 .....	6
Rule 74.05(d) .....	8
74.06(b)(4) .....	8

20 C.S.R. 800-2.010 .....	7
---------------------------	---

## Argument

Greenwich's attempt to graft onto §375.906 R.S.Mo. an additional service requirement should be rejected. Greenwich is a foreign insurance company. In order to do business in Missouri, the legislature requires Greenwich to consent to the methods of service contained in §375.906 R.S.Mo. This statute states that service of process "shall be made" by delivery of a copy of the petition and summons to the director of the department of insurance who shall immediately forward "by first class mail" to the secretary of the foreign insurance company. R.S.Mo. §375.906.5 does not require service by registered or certified mail.

The statute provides how "proof" of that method of service is achieved:

5. Whenever process is served upon the director of the department of insurance, financial institutions and professional registration, the deputy director of the department of insurance, financial institutions and professional registration, or the chief clerk of the department of insurance, financial institutions and professional registration under the provisions of this section, the process shall immediately be forwarded by first class mail prepaid and directed to the secretary of the company, or, in the case of an alien company, to the United States manager or last appointed general agent of the company in this country; provided, that there shall be kept in the office of the director of the department of insurance, financial institutions and professional registration a permanent record showing for all process served the

name of the plaintiff and defendant, the court from which the summons issued, the name and title of the officer serving same, and the day and hour of the service.

(Bate's Opening Brief App. A-23.) It is undisputed that proper proof of service upon Greenwich was kept in accordance with this statute and provided to the trial court. (See service of process affidavit at L.F. 42 and Appellants' opening brief appendix at A-6.)

Greenwich relies heavily on Maddox v. State Auto. Mut. Ins. Co., 356 S.W.3d 231 (Mo.App. 2011) for its assertion, that in addition to meeting the service requirements of §375.906 R.S.Mo, the Bates also have the burden to meet the service by registered or certified mail requirements of Rules 54.15 and 54.20. However, the Maddox opinion is silent on, and cannot be reconciled with, Rule 54.18. More persuasive is Strong v. American States Preferred Ins. Co., 66 S.W.3d 104, 106 (Mo.App. 2001) as the same court as Maddox expressly rejected the argument that service under §375.906 must also comply with the certified or registered mail requirements found in Rules 54.15 and 54.20 because of Rule 54.18, which allows for service either by statute or by rule.

This Court has made clear by its enactment of Rule 54.18, that when a statute provides for service, a party may choose to serve pursuant to the requirements of the statute, or by the requirements in a rule. If the Bates had chosen to serve Greenwich under the requirements of Rule 54.15, then they would have had to meet the service requirements set forth in Rules 54.15 and 54.20. However, they chose to serve and proved proper service upon Greenwich pursuant to the requirements of §375.906 R.S.Mo., (see service of process affidavit at L.F. 42 and Appellants' opening brief

appendix at A-6) a method permitted by the statute and a choice permitted by Supreme Court Rule. The trial court erred in setting aside the default.

Greenwich asserts, for the first time on appeal, that the Bates did not show compliance with the service requirements of §375.906 R.S.Mo. by actually serving the director of insurance. Greenwich asserts, for the first time on appeal, and without any proper preservation or proof, that the return shows the summons and petition were delivered to “Kim Landers with the title listed as ‘Legal Mo. Dept. of Insurance’” and the 2009 Official Manual for Missouri states that “Kim Landers was a senior office support assistant (keyboard).” (Respondent’s brief at 30, 31.)

Greenwich never asserted this as a basis to set aside the default judgment to the trial court. Its argument is not properly raised or preserved. In addition, its argument fails in light of 20 C.S.R. 800-2.010.(1)(A), adopted pursuant to §374.045 R.S.Mo., which provides that service of process on foreign insurance companies may be made by delivery to a designee of the director. (App. A-1, A-3.) There is nothing improper or inconsistent with this regulation permitting delivery to a designee of the director and there is no dispute that the Director of Insurance received service. (L.F. 10, 41, 42; Appellant’s opening brief appendix at A-5, A-6.) It is undisputed that the Director received service from the Bates, and the Director properly maintained proof that service was made upon Greenwich in accordance with §375.906 R.S.Mo. The trial court erred in setting aside the default judgment.

The remainder of Greenwich's brief raises untimely, merit-based defenses improperly cast as jurisdictional arguments. The trial court entered the default judgment against Greenwich on March 22, 2010. Greenwich did not move to set the default judgment aside until August 6, 2012. Greenwich was too late to seek relief under Rule 74.05(d) (relief asserting a claim of a meritorious defense and for good cause shown must be requested within one year of entry of judgment). Its arguments of whether Bate was employed by Cintas Corporation and was entitled to any coverage, or whether the policy contained any applicable underinsured motorist coverage that matured, accrued or renewed in Missouri are all time-barred defenses.

Greenwich proceeded under Rule 74.06(b)(4) asserting that the judgment was void. The only reasons this court can affirm the trial court's actions in setting aside the judgment, are if the judgment is void under Rule 74.06(b)(4). A judgment is void under Rule 74.06(b)(4) only if the circuit court that rendered it: 1) lacked subject matter jurisdiction; 2) lacked personal jurisdiction; or 3) entered the judgment in a manner that violated due process. Sieg v. International Environmental Management, Inc., 375 S.W.3d 145, 149 (Mo.App. 2012); Forsyth Financial Group, LLC v. Hayes, 351 S.W.3d 738, 740 (Mo.App. 2011). Greenwich concedes that its lack of subject matter argument fails in light of J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 253 (Mo. banc 2009). The Bates have proven compliance with the service requirements of §375.906 R.S.Mo. Greenwich provides no authority for this court's scope of review to set aside the default judgment for merit-based defenses that are time-barred.



### **Conclusion**

Wherefore, for the above set forth reasons, Appellants Charles and Deborah Bate move that this court reverse the trial court's judgment and remand with directions to reinstate the default judgment against Greenwich and for whatever further relief this court deems fair and just.

/s/ Susan Ford Robertson  
Susan Ford Robertson #35932  
Zach Bickel #58731  
The Robertson Law Group, LLC  
1903 Wyandotte, Suite 200  
Kansas City, MO 64108  
816-221-7010 (phone)  
816-221-7015 (fax)  
[susanr@therobersonlawgroup.com](mailto:susanr@therobersonlawgroup.com)

Christian L. Faiella #45684  
Rex V. Gump #25634  
Tatlow, Gump, Faiella & Wheelan  
110 North Fifth Street,  
Moberly MO 65270  
Counsel for Appellants Ray Charles Bate and  
Deborah Sue Bate

**Appendix—electronically filed separately**

§374.045 R.S.Mo.....	A-1
20 C.S.R. 800-2.010 .....	A-3

### **Certificate of Service and Compliance**

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on December 12, 2014, she electronically served Appellant's Reply Brief and Appendix through Missouri's electronic filing system and by separate electronic mail on Steven Hughes at Hughes@pspclaw.com as Counsel for Respondent Greenwich Ins. Co. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 1,294 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson  
SUSAN FORD ROBERTSON, Attorney

